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No. 88-59

In The

Supreme Court of the United States

October Term, 1988

UNITED STEEL & WIRE COMPANY,

Petitioner,

vs.

CARL STALLWORTH, COYLE SWIFT, VINCENT GARRETT, R. D. WARREN, WALTER STOKES, HELEN ANDERSON, DAVID CHASE, LARRY CLINTON, MILTON FIELDS, RHONDA HOWLETT, CARL JOHNSON, DAWN KING, CARL MAYBERRY, HOWARD MORGAN, THOMAS ROBINSON, WILLIE SLAUGHTER, CLARENCE TRAVIS, BRIAN TREAT, KATHY WHITNEY and RODGER WILLIAMS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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17 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

When the Battle Creek United Steel & Wire operation, as it was then known, was closed by its owner, Roblin, in early July 1982 and all of its union employees' jobs were terminated, the United Auto Workers Unions ("UAW") began to protest the loss of jobs for its members and made it clear that the "rehiring" procedure used by the Petitioner, United Steel & Wire ("US&W") would be challenged by the union.

The Roblin operations of United Steel & Wire were ceased on July 1, 1982. On July 9, 1982 the UAW filed a

law suit against Roblin and the Petitioner claiming they had an obligation to hire only UAW members who were formerly employed by Roblin and to abide by the collective bargaining agreement with the UAW. The UAW argued that US&W was the *alter ego* of Roblin. The UAW initiated picketing in front of the Battle Creek plants of the Petitioner approximately five (5) days after the Petitioner started operating with nonunion employees.

All of the Respondents in this action were hired by the Petitioner on July 28, 1982 or shortly thereafter. Most of the Respondents were hired through the Michigan Employment Security Commission office and all were informed by the Petitioner that a new company was forming and they would have permanent jobs if they completed the requisite probationary period. They were told several times throughout their employment with the Petitioner that they would not be replaced by the union employees who were picketing at the time.

All of the Respondents were forced to withstand serious physical attacks and threats of attack from the picketing employees while entering and leaving the work place during the course of their employment. The Respondents relied on the Petitioner's assurances that it would not replace them and withstood the attacks from the picketers.

The dispute between the Petitioner and the UAW was never litigated and no court action resolved it. Instead, a settlement agreement was reached between the Petitioner and the UAW on October 2, 1982 including a collective bargaining agreement between the two parties and an agreement to displace Respondents and re-employ union members.

When the settlement was reached between Petitioner and the striking union employees, Respondents were all

gradually placed on layoff and replaced by the union members. It is the contention of the Respondents that the assurances provided to them upon hire by Petitioner, coupled with Respondents' detrimental reliance on those promises, constituted a contract of employment between the Respondents and Petitioner. Respondents further contend that the replacement of Respondents by the striking employees was a breach of their contract of employment with Petitioner and thus actionable in state court under Michigan contract law.

Petitioner claims Respondents' State Contract Claim is preempted by Federal law. The trial court denied Petitioner's Motion for Summary Disposition and the Michigan Court of Appeals affirmed the trial court's decision. The Michigan Supreme Court denied Petitioner's Application for Leave to Appeal and this matter is now before the U.S. Supreme Court on Petitioner's Petition for Writ of Certiorari.

ARGUMENT

I.

RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Petitioner correctly states in its brief that the doctrine of preemption is generally derived from two Supreme Court cases: *San Diego Building Trades Council* v *Garmon*, 359 US 236 (1959) and *Machinists* v *Wisconsin Employment Relations Commission*, 427 US 132 (1976). To summarize those cases, the *Garmon* doctrine preempts state actions which regulate activity protected or prohibited by the National Labor Relations Act (NLRA). The *Machinists* doctrine preempts state

actions which regulate activity that Congress intended to be left unregulated and controlled by the free play of economic forces. In *Belknap, Inc.* v *Hale*, 463 US 591, 77 L Ed 2d 798 (1983), the Supreme Court held that a case nearly identical to the present case would not be precluded by the federal preemption doctrine and discussed both the *Machinists* and *Garmon* cases. Petitioner herein argues that the *Garmon* doctrine would preempt Respondents' state cause of action. Central to this matter and to the *Belknap* decision, is another line of preemption cases which recognize an exception to *Garmon*. In those cases, matters in which states have a distinct interest are excepted from the preemption doctrine. This matter falls under that line of cases.

A. Respondents Did Not Have An Arguable Unfair Labor Practice Claim.

Petitioner claims that because US&W was a new company it had no duty to negotiate with the union employees and thus violated the NLRA when it replaced Respondents with union members. Thus, Petitioner argues, Respondents had the basis for an unfair labor practice claim with the National Labor Relations Board (NLRB) and their state court claims should be preempted.

Respondents would only have an arguable unfair labor practice claim, if the UAW had no valid claim to the former positions of its members. That issue was never resolved by a court or the NLRB and the matter was settled. The UAW did not voluntarily dismiss its claim against US&W, but dismissed it only after US&W agreed to return the union employees to their former positions. The "Accord and Satisfaction" signed by the Petitioner, US&W and the UAW stated in part:

> The UAW and its Locals 704 and 1215, in consideration of certain promises made by the

United Steel & Wire Co. in a collective bargaining agreement, agreed to by the said parties, hereby agree:

(1) To dismiss voluntarily Count I of *UAW et al.*, Case No. K82-205-CA(9), currently pending in the U.S. District Court for the Western District of Michigan. If accomplished before ratification, the said dismissal shall be without prejudice, until the said collective bargaining agreement is ratified. Immediately upon ratification, it shall be with prejudice. It shall be without attorney fees or costs against either party.

* * *

The parties further agree that this shall not, in any way, constitute an admission with respect to these lawsuits, or any other litigation that may be pending about the events in question. Rather, the parties have entered into this accord and satisfaction to resolve all issues arising between them, their agents, officers and/or members, as to the allegations made in the said litigation, or otherwise arising in connection with their labor dispute, in the earnest desire to avoid the cost and risk of further litigation.

Thus, the UAW did not voluntarily dismiss its claim against US&W, but dismissed it only after US&W agreed to return the union employees to their former positions.

Petitioner's attempt to distinguish the facts of the present case and *Belknap* is weakened by the fact that the union in this case had filed a law suit claiming a duty on Petitioner's part to negotiate with the union. This matter was never resolved by a court because of the settlement reached by the parties. If the union had

been correct, the facts of *Belknap* and the present case would be indistinguishable and Respondents would not have had an available NLRB remedy. Respondents in both cases were nonunion employees replaced by union employees with whom the company had the duty to negotiate. The *Belknap* Court explained:

> . . . The claimed breach is the discharge of respondents to make way for strikers, an action allegedly contrary to promises that were binding under state law. As we have said, respondents do not deny that had the strike been adjudicated an unfair labor practice strike Belknap would have been required to reinstate the strikers, an obligation that the state court could not negate. But respondents do assert that such an adjudication has not been made, *that Belknap prevented such an adjudication by settling with the Union and voluntarily agreeing to reinstate strikers*, and that, in any event, the reinstatement of strikers, even if ordered by the Board, would only prevent the specific performance of Belknap's promises to respondents, not immunize Belknap from responding in damages from its breach of its otherwise enforceable contracts.
>
> *Belknap*, 77 L Ed 2d at 815, emphasis supplied.

In this case and in *Belknap*, the validity of the position of the striking employees and the legal status of the replacement employees were in question and were not resolved by a court or board finding. Instead the employer voluntarily settled the matter with the striking employees and replaced the nonunion employees. The Court recognized in *Belknap* that even had the NLRB ordered reinstatement of the strikers, the replacement employees would still have a state cause of action for breach of contract. The Court recognized that

an employer sets itself up for liability to both the strikers and the replacement employees by making promises of permanent employment to the replacements. See footnote 9, *Belknap*, 77 L Ed 2d at 811.

Again, it is clear that the only difference between the *Belknap* plaintiffs and the Respondents herein are the facts which led to the labor dispute in question. Once the labor dispute had begun, the facts of both cases are essentially identical. To find that Respondents had an arguable unfair labor practice claim, this Court must assume that a final resolution of the labor dispute in this case by a court would have resulted in a finding for the employer. Such a resolution never occurred and the employer chose instead to settle the matter. In fact, if the Court had held for the employer, the Respondents would still be employed. If the union had won, the Respondents would have had no unfair labor practice claim. The present facts could result only from a settlement. Just as in *Belknap*, this Court must view the present Respondents as innocent third parties to a settled labor dispute, without making a finding as to what the final outcome would have been if the labor dispute had been fully litigated. Thus, the factual distinction attempted by the Petitioner is false and the present facts very clearly mirror the dispute in *Belknap*.

B. This Case Falls Under The Exception To The *Garmon* Doctrine Relied On By The Court In *Belknap, Inc.* v *Hale.*

Petitioner argues that if this Court accepts that Respondents had an arguable unfair labor practice claim, then the *Garmon* doctrine requires preemption of their state claims. While the *Belknap* Court discussed the question of whether or not the replaced employees had a claim which the NLRB could resolve,

the Supreme Court did not base the *Belknap* opinion on that issue. The Court instead based its opinion on whether or not the state causes of action brought by the *Belknap* plaintiffs were "so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law." *Belknap*, 77 L Ed 2d at 814.

The *Belknap* Court first analyzed the *Belknap* plaintiffs' state claim for misrepresentation. The Court discussed the line of cases finding exceptions to the *Garmon* doctrine, including *Linn* v *Plant Guard Workers*, 383 US 53 (1966); *Farmer* v *Carpenters*, 430 US 290 (1977); and *Sears Roebuck & Co.* v *Carpenters*, 436 US 180 (1978). Petitioner, in its brief at page 24 cites this line of cases as illustrating its argument that the plaintiffs in those cases had no NLRB remedy available as opposed to its claim that Respondents herein had such a remedy. It is clear, however, that the Supreme Court took this precedent into account when it finally concluded that:

> The state interests involved in this case [state claim for misrepresentation] clearly outweigh any possible interference with the Board's function that may result from permitting the action for misrepresentation to proceed.
>
> *Belknap*, 77 L Ed 2d at 815.

Thus, the Court based its opinion on the State's special interests, not whether the plaintiffs had an available NLRB remedy.

Finally, after a discussion of the misrepresentation issue and a finding that the misrepresentation claims were not preempted, the Court went on to discuss the *Belknap* plaintiffs' claim for breach of contract. The Court stated:

> Neither can we accept the assertion that the breach of contract claim is preempted. . . .
>
> * * *
>
> . . . We have already concluded that the federal law does not expressly or impliedly privilege an employer, as part of a settlement with a union, to discharge replacements in breach of its promises of permanent employment. Also, even had there been no settlement and the Board had ordered reinstatement of what it held to be unfair labor practice strikers, the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers. *The interests of the Board and the NLRA, on the one hand, and the interest of the state in providing a remedy to its citizens for breach of contract, on the other, are 'discrete' concerns,* c.f. *Farmer* v *Carpenters, supra,* at 304, 51 L Ed 2d 338, 97 S Ct 1056. We see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy of the federal labor laws.
>
> *Belknap,* 77 L Ed 2d at 815-816, emphasis supplied.

The "discrete" concerns are identical in this case.

Petitioner cites other cases in which the Supreme Court did not apply the exception to *Garmon* for matters involving state interests. For instance, the 5th Circuit case entitled *Eitmann* v *New Orleans Public Services,* 730 F2d 359 (5th Cir 1984). Yet, neither this case nor others cited by the Petitioner involve facts

which so closely duplicate the facts in the present case as those of the *Belknap* decision. The Court in *Local 926, International Union of Operating Engineers* v *Jones*, 460 US 669 (1983) neatly outlined the theory behind the recognized exceptions to the *Garmon* doctrine:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. *Garmon, supra*, 359 U.S. at 245, 79 S. Ct., at 779; see *Sears, supra*, 436 U.S., at 187-90, 98 S. Ct., at 1752-54. Although the '*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion,' *Sears, Roebuck & Co.* v *Carpenters, supra*, at 188, 98 S. Ct., at 1752, if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily preempted. *Farmer, supra*, 430 U.S., at 296, 97 S. Ct., at 1061. When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in the local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. *Garmon, supra*, 359 U.S., at 243-244, 79 S. Ct., at 778. The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

> See *Sears, supra*, 436 U.S., at 188-89, 98 S. Ct., at 1752; *Farmer, supra*, 430 U.S., at 297, 97 S. Ct., at 1061. *Jones*, 103 S. Ct. 1453, 1458-1459.

Therefore, the Supreme Court has regularly recognized that *Garmon* will not be applied in a mechanical fashion and that the question of whether a state cause of action is to be excepted from the *Garmon* doctrine "involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause of action to the state as a protection to its citizens."

The *Belknap* Court undertook such a sensitive balancing between the interests of the state in protecting replacement employees and the interests of federal labor law in resolving labor disputes. The Court noted:

> Arguments that entertaining suits by innocent third parties for breach of contract or for misrepresentation will 'burden' the employer's right to hire permanent replacements are no more than arguments that 'this is war,' that 'anything goes,' and that promises of permanent employment that under federal law the employer is free to keep, if it so chooses, are essentially meaningless. It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships. We cannot agree with the dissent that Congress intended such a lawless regime.
>
> *Belknap*, 77 L Ed 2d at 808.

The Supreme Court in *Belknap* spoke clearly in allowing a state cause of action for breach of contract for nonunion replacement employees.

CONCLUSION

Petitioner herein has attempted to muddy the waters surrounding the *Belknap* decision by citing a distinction between the facts of the *Belknap* case and this case as critical. In fact, the only difference between the facts of the *Belknap* case and this case is the method by which the dispute between the employer and the union began. That distinction has no bearing on the critical finding in the *Belknap* case: innocent third parties to a labor dispute have a right to sue the employer in state court without preclusion of the action by the preemption doctrine. The *Belknap* Court recognized that the interests of the NLRB on one hand and the interests of the state in providing a remedy to its citizens for breach of contract on the other, are discrete concerns. This case, therefore, very neatly fits into the line of cases recognized by the Supreme Court wherein a state cause of action is permitted under an exception to the *Garmon* doctrine.

Finally, the Respondents' claim for relief against the Petitioner is well grounded in Michigan law. See *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 292 NW 2d 880 (1980), *rehearing denied* 409 Mich 1101 (1980). In that respect this case is similar to the recent decision of the Supreme Court in *Lingle* v *Norge Division of Magic Chef, Inc.*, __ US __, 56 USLW 4512 (decided June 6, 1988). In *Lingle*, the Supreme Court narrowed the grounds for Federal preemption under Sec. 301 of the Labor Management Relations Act, 29 USCA § 185. We can discern no reasons why the

holding in *Lingle* should not be applied to the claims of the Petitioner in this matter.

WHEREFORE, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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